

1 do?

2 MR. CHATTERJEE: We've done some of it. We're trying
3 to do some more of it because, we notified them yesterday. We
4 think we've found some additional material. We're not sure
5 what it is, and we're trying to take the forensic images and
6 provide that information to them if it's responsive.

7 THE COURT: Well, it seems to me that the way, the
8 way things work is that the plaintiff makes a request for
9 evidence that's relevant to the claims and defenses of either
10 party of which they're entitled to under the rules. If they've
11 requested this stuff and you have not objected to it, then it
12 seems to me it's your burden to produce it. And I normally
13 would not go to allowing one party to have a mirror image of
14 another party's computer unless I was, unless I had some reason
15 to believe number one that it wasn't being, that, you know,
16 that the defendant wasn't doing it to the extent that they were
17 obligated to do it under the federal rules, or there was some
18 sort of chicanery involved, and I think that's, that's where we
19 are on, on this particular things.

20 MR. CHATTERJEE: We, we've produced everything we've
21 been able to find and we've searched fairly thoroughly of all,
22 all the electronic devices we've been able to find to date, and
23 we continue to do that. So, Your Honor, I mean, we've produced
24 the code that we've been able to find. Now what the plaintiff
25 wants to find, is they want to find the Harvard connection

1 code--

2 THE COURT: Right.

3 MR. CHATTERJEE: --on these laptops. It isn't there.
4 They may not be happy about that, but that's a truism. They
5 want to find Harvard connection code copied into the FaceBook
6 code that that we produced. That isn't there. They're not
7 happy about that. We've, there are some pieces of
8 information--

9 THE COURT: Well, they're not convinced it's not
10 there. That, that's the issue.

11 MR. CHATTERJEE: Right, and Your Honor, we searched
12 and, and--

13 THE COURT: Right.

14 MR. CHATTERJEE: --some evidence simply may not exist
15 anymore. We, we've looked thoroughly for it, and I'm not sure
16 the Draconian relief of mirror imaging every single one of
17 these systems is going--

18 THE COURT: You're saying it would do no good because
19 you've already done it, and you can't find it.

20 MR. CHATTERJEE: Yes, Your Honor.

21 THE COURT: That's your position.

22 MR. CHATTERJEE: Yes, Your Honor.

23 THE COURT: All right.

24 MR. HAMPTON: Your Honor, if I might be heard
25 briefly--

1 THE COURT: Sure.

2 MR. HAMPTON: --on behalf of defendant Saverin.

3 Defendant Saverin's situation illustrates I think a bit of a
4 problem with the plaintiff's monolithic approach here. Even
5 with Mr. Hornick's proposal for a rolling search, he's
6 requested the images of all the individual defendants' hard
7 drive. Mr. Saverin is one of the individual defendants. In
8 opposition to this motion, he submitted a declaration stating
9 under oath that he never had any of the code, either for the
10 Harvard connection or for the FaceBook, and his involvement
11 with this whole case was brief. He's an economics student who
12 was providing some inside on the business model for the
13 FaceBook, never had the relevant code. The situation is even
14 worse, however, Your Honor, because he longer has the hard
15 drive for the relevant period we're talking about. The
16 computer that he was using at the time he's given to his
17 mother, who is a clinical psychologist in Florida. She now has
18 the computer and is using that in the conduct of her business
19 and presumably that has highly sensitive patient information on
20 it. So the plaintiff's proposal, although it seems reasonable
21 to say well we just want to start with the individual hard
22 drives of the individual defendants and the servers of the
23 FaceBook, really shows that at least with respect to defendant
24 Saverin how overbroad and unjustified that request is. I'm
25 sure you'll hear from Mr. Hornick about what he thinks of where

1 we are on that issue now, but as I just heard his proposal
2 today, he would still propose that we provide the image of Mr.
3 Saverin's individual hard drive, and there's no record evidence
4 whatsoever that that is reasonably calculated to lead to
5 anything that's relevant in the case, particularly the source
6 code that they claim is really what they're after here.

7 MR. HORNICK: Your Honor, if I might?

8 THE COURT: Go ahead.

9 MR. HORNICK: There's a very important reason to do
10 imaging other than what we've heard. They say, and this is the
11 first we've heard that they've made these steps, there's a lot
12 of unexplained things about the background of this code, but
13 there's a very important reason to do imaging other than to
14 find the code and that's to find if it was deleted, for example
15 after claims were asserted in this case. That's something
16 that, that an expert would look for. Five years ago, ten years
17 ago--

18 THE COURT: Wait a minute, hold on.

19 MR. HORNICK: Yes.

20 THE COURT: Hold on. Are, are you looking, is your
21 search including a search for deleted documents that may be on
22 the hard drive that an expert would have been able to retrieve?

23 MR. CHATTERJEE: Your Honor, we've searched for, for
24 code anywhere on these devices.

25 THE COURT: Answer the question specifically.

1 MR. CHATTERJEE: Yes.

2 THE COURT: At, does your, has the search that you've
3 conducted involve a search that would involve the search of
4 deleted items that might be recovered?

5 MR. CHATTERJEE: Yes, and it continues to this day.

6 THE COURT: Continue, Mr. Hornick.

7 MR. HORNICK: So the issue is not just whether the
8 information might have been deleted, but when it was deleted
9 and in what situation, what concept.

10 THE COURT: Well, if they can't find the deleted
11 items, how are they going to find when it was deleted?

12 MR. HORNICK: Well an expert may be able to confirm
13 those things. Five years ago, ten years ago, imaging hard
14 drives was unusual. But today--

15 THE COURT: I know.

16 MR. HORNICK: --it has become very common.

17 THE COURT: I know, but it's uncommon for one side in
18 a dispute to get a mirror image of another side's computer.
19 That is not the usual way the things are done in litigation.
20 That, that, that's an extraordinary remedy which is the reason
21 that I'm trying to assess the need, your asserted need and what
22 their position is.

23 MR. HORNICK: Well, Your Honor, I would say that
24 although that it is unusual that it may not happen on the every
25 day course, but it is not so drastic because all it is is the

1 device to help try to recover documents that everybody admits
2 existed at one time.

3 THE COURT: Yes, but one of the problems with it is
4 you got the whole hard drive and you get tons of documents on
5 there that are, that are not, not relevant, not necessary for
6 the particular purpose and it's a, it's, a lot of defendants or
7 opposing parties see it as a gross invasion of the privacy of
8 their business. That's the problem with it.

9 MR. HORNCICK: Well other courts have considered that
10 very issue and the problem is that you can't do an image of
11 just the part that you need.

12 THE COURT: I know, that's the--

13 MR. HORNCICK: Because you don't know what part you
14 need.

15 THE COURT: --reason why it's an extraordinary remedy
16 to give people mirror images of other people's computers.

17 MR. HORNCICK: But we've built into the particular
18 protocol that we're proposing protections against finding and
19 using information that is not what we're looking for. First of
20 all, we originally proposed that our expert would do this. We
21 don't want it to be our expert now for various reasons. We
22 would propose an independent expert do this. And the
23 independent expert is to look only for code. And the
24 independent expert, we will not be present while he does his
25 work. He'll sign the protective order. There will, nothing

1 that he does will disclose any attorney/client privilege.

2 THE COURT: And it will be at your expense?

3 MR. HORNCICK: And it will be at our expense, that's
4 right. What he finds will be provided to both counsel and to,
5 and we can provide it to the Court or he can provide it to the
6 Court. He maintains the copies of that, those devices,
7 whatever they are in a secure fashion or he can provide them to
8 the Court to maintain in a secure fashion until the case is
9 over. The courts that have considered this issue have looked
10 at all of these issues about whether the, whether you're
11 providing access to privileged information or confidential
12 information or other types of information, and they've said
13 that you have to, have to weigh the needs of the case versus
14 the burden. And in many cases have found that the needs of the
15 case outweigh the burden and what they do is they put into
16 place a protocol that protects the parties' rights so that,
17 that burden is minimized.

18 THE COURT: All right. What's your problem with that
19 protocol?

20 MR. CHATTERJEE: Your Honor, it's, it's exactly the
21 escalation procedure that Mr. Hornick identified. First off--

22 THE COURT: But in what, what, why is there, why is
23 that a, why is his proposal a problem from your point of view?
24 The person who's going to look at it is not connected with
25 them. In other words, they're not going to, you're not going

1 to have the problem of information that otherwise would not be
2 disclosed to them, being disclosed to them. And it's going to
3 be done at their expense, and the person is willing to sign
4 whatever protective order is necessary to protect you. Why do
5 you object to it?

6 MR. CHATTERJEE: It's, it, it's an issue of burden,
7 Your Honor. I mean this is a--

8 THE COURT: Why is it a burden on you--

9 MR. CHATTERJEE: It's because of--

10 THE COURT: --as opposed to them?

11 MR. CHATTERJEE: It's because of the business
12 disruption that would flow from it. If they just want to--

13 THE COURT: How is mirror, making a mirror image of
14 hard drives disrupt the business? I thought that was something
15 that was fairly easily done?

16 MR. CHATTERJEE: It, it is not, Your Honor. In, in
17 order to image our entire server architecture, that's where the
18 600 devices come into play. You can't, you have to shut down
19 the system in order to make copies of all of these things.

20 THE COURT: And how long does that take?

21 MR. CHATTERJEE: It could take up to two weeks to do,
22 Your Honor. And, and if, if we follow Mr. Hornick's procedure,
23 and let me offer maybe--

24 THE COURT: And is that the, but that is the problem
25 you have with it, that it's, it's the burden on your business

1 and the disruption, that's your objection?

2 MR. CHATTERJEE: Yes, Your Honor. If, now, the other
3 piece of it of course is if we're going to, if we're going to
4 do any kind of mirror imaging, I think we should focus on the
5 place of where it's likely to be. And to me, I think
6 Mr. Hampton talked about one of the defendants. The other
7 defendants were also non-technical people. The person at the
8 fulcrum is Mark Zuckerberg and if, if we, we don't have the,
9 the computer we, we are still looking for it, and we may find
10 it, that he had during the relevant time period, that's the
11 issue. But, if we wanted to image, for example, his hard drive
12 and look for source code on that hard drive during any of the
13 relevant time periods on his personal computer, that might be
14 one thing we could do, and if we can't go, we've tried to go
15 back to the outsourced server, architectural people that we
16 signed an agreement with to get it, they, they didn't have it
17 anymore. We can try and find some additional materials that
18 are not in service that are during this relevant early time
19 period for FaceBook, and we could image those. But that's a
20 very narrow inquiry. If it's not there, it's not going to be
21 anywhere. And we've already looked there.

22 THE COURT: Well, what, let me ask the plaintiff's
23 counsel, what do you say to his, which seems to be the only
24 objection to doing this is this burden and interruption.

25 MR. HORNICK: Yes. First of all there'd be no

1 disruption of their business because to image the individual's
2 devices won't disrupt their business. To image the server that
3 was used at the time of launch and shortly after launch will
4 not interrupt their business because they're not using those
5 servers anymore, and if we ever get to the point where we need
6 to image their servers that they're using today, first of all,
7 we'd only want to image the one that is running Harvard, that's
8 not their whole business; secondly, I'd be very surprised if a
9 company like this is not using redundant servers. That means
10 you're running both at the same time. You have a backup. If
11 one dies, you have a backup that's running. So you can image
12 one, the company runs on the other one. No disruption of the
13 business. Now, in addition to that, I heard a very interesting
14 fact. They asked the third party server if they have it. They
15 said we don't have it anymore. I'm sure they didn't go in and
16 image their hard drive and look for it, and that's what we want
17 to do.

18 THE COURT: Well let's, let me ask you this. If we,
19 if, if you were doing it so you were not disrupting their, I
20 mean, does it make sense to do it, you talked about a rolling
21 basis, just do a discreet number initially and have your expert
22 look at that, and if that, if we did it that way, what would,
23 what would be the discreet number you'd start with, just go
24 down the list?

25 MR. HORNICK: Well, I'd start with the devices of the